

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID ELLIOT,	:	CIVIL ACTION
Petitioner	:	
	:	
	:	
v.	:	
	:	
BEN VARNER, et al	:	
Respondents	:	
	:	NO. 02-8252

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 19, 2004

I. INTRODUCTION

Petitioner David Elliot ("Elliot") is a state prisoner currently serving a life sentence at SCI Smithfield for the murder of James Rebuck ("Rebuck"). Elliot's counsel filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on October 31, 2002. In his petition, Elliot claimed that his trial counsel was ineffective for failing to object to the court's instruction on co-conspirator liability with respect to first degree murder and the charge given on voluntary manslaughter.

The petition was referred to United States Magistrate Judge Arnold Rapoport ("Judge Rapoport"). After respondents filed specific answers to the petition and a memorandum of law in support thereof, Judge Rapoport issued a Report and Recommendation ("R & R")(paper no. 8) that the petition be

denied. Elliot filed objections to the R & R and the court held a hearing on February 2, 2004. After de novo review, for the reasons set forth below, the petition will be denied.

## **II. BACKGROUND**

On May 1, 1997, after a jury trial before the Honorable Ward F. Clark, Elliot was convicted of first degree murder, burglary, conspiracy to commit murder, and solicitation to commit murder. At trial, the evidence showed Elliot elicited the help of his cousin, Scott Stocklin ("Stocklin"), to kill James Rebuck in retaliation for a sexual advance Rebuck made on Elliot.

On the night of October 24, 1996, Elliot and Rebuck had been drinking at a bar. Elliot went to Rebuck's house and passed out after using cocaine and taking pills. When he awoke, Rebuck had removed Elliot's pants, was on top of him and attempting to have sex with him. Elliot left in a rage; after arriving home, he called several people to try to find someone to help him kill Rebuck. Both his roommate and another friend refused to help him; Elliot then called his cousin, Stocklin.

In the early morning of October 25, Elliot and Stocklin arrived at Rebuck's house. They were wearing latex gloves but kept their hands hidden in their pockets. Stocklin had a baseball bat and struck Rebuck with it repeatedly. While Stocklin hit Rebuck with the bat, Elliot went to the kitchen to get a knife. Rebuck was stabbed forty-five times; there were nine stab

wounds to the heart. The autopsy showed that Rebuck lost about 40% of his blood and probably died from blood loss.

Elliot was sentenced to life imprisonment. Trial counsel filed a timely appeal on Elliot's behalf. On March 6, 1999, the Superior Court affirmed the sentence. Commonwealth v. Elliot, 625 Phila. 1998. The Pennsylvania Supreme Court denied *allocatur* on September 28, 1999.

Elliot, in his petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9551, claimed trial counsel was ineffective for failing to object to portions of the jury charge. Elliot's petition was denied; the Superior Court affirmed the denial of relief on November 8, 2001. Commonwealth v. Elliot, 878 EDA 2001. The Pennsylvania Supreme Court denied *allocatur* on October 15, 2002. Commonwealth v. Elliot, 995 MAL 2001.

### **III. DISCUSSION**

Elliot asserts his trial counsel was ineffective for failing to object to the court's incorrect instructions on co-conspirator liability. Elliot contends the jury instructions diluted the Commonwealth's burden of proof and allowed him to be convicted based on the intent of his accomplice without regard to his actual intent. He argues the jury could have convicted him on the incorrect instructions without finding that he specifically intended that Rebuck die.

For a first degree murder conviction, the jury must find that the defendant possessed a specific intent that the victim die. The court gave broad based co-conspirator instructions that if the jury found a conspiracy to commit a criminal act, each party was equally culpable; Elliot contends the conspiracy instruction allowed the jury to find him guilty of first degree murder even if he did not have the specific intent to kill.

Elliot relies on Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) and Everett v. Beard, 290 F.3d 500 (3d Cir. 2002). These cases involved conspiracies to commit robbery during which someone was killed. In both cases, the Court of Appeals concluded the co-conspirators may not have had the requisite intent to kill necessary for the first degree murder conviction, because the conspiracies did not involve murder.

In Smith v. Horn, the Court of Appeals stated the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." Smith, 120 F.3d at 411. The court concluded that the jury instructions were confusing and allowed conviction of Smith for first-degree murder without a finding of specific intent. In Everett v. Beard, 290 F.3d 500 (3d Cir. 2002), Gerald Everett drove the car carrying two men who robbed and murdered a grocery store owner. No one alleged that Everett intended anyone be shot; the trial court repeatedly instructed that Everett could be found guilty of intentional murder if his

accomplice intended to cause the victim's death. Both Smith and Everett are distinguishable from Elliot's case.

Elliot devised a plan with Stocklin to kill Rebuck. Many witnesses testified that Elliot planned to kill Rebuck. After the instructions on conspiracy, the trial court correctly instructed the jury on first degree murder and the specific intent requirement. Judge Rapoport viewed the charge as a whole and found that because first degree murder was correctly defined, there was no error.

Elliot presents this as an ineffective assistance of counsel claim because his counsel failed to object to the faulty instructions. Therefore, even if the instructions were faulty, the court must evaluate whether, but for counsel's failure to object, "the result of the proceeding would have been different" or that the ineffectiveness was "sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). The overwhelming evidence at trial showed that Elliot intended to kill Rebuck; even if the instructions were confusing, Elliot was not prejudiced by them. See Commonwealth v. Chester, 557 Pa. 358, 380, n. 12, 733 A.2d 1242, 1253 n.12 (1999); Commonwealth v. Wayne, 553 Pa. 614, 720 A.2d 456 (1998).

Elliot also contends that his trial counsel was ineffective because he failed to object to instructions on voluntary manslaughter imposing a burden on the defense. The trial court stated in part:

A sudden passion which would reduce an unlawful killing from Murder to Voluntary Manslaughter, must be due to legally adequate provocation. And even if there's sufficient legal provocation, if there's sufficient time to cool, then the killing cannot be voluntary manslaughter. The killing has to be committed under legally sufficient provocation in momentary frenzy or passion which placed the accused beyond control or reason. Then, in such cases, you're justified in finding the defendant guilty of voluntary manslaughter.

The court also instructed that the jury could return a verdict of voluntary manslaughter if it was satisfied beyond a reasonable doubt that the killing "was unlawful...without malice while in the state of sudden and intense passion resulting from serious legal provocation."

Elliot asserts that these instructions unconstitutionally gave him the burden of negating malice. Throughout the charge, the court stated the burden of proof was on the Commonwealth. The court never made a statement that Elliot had to prove that there was no malice; burden-shifting cannot be inferred from the instructions on voluntary manslaughter. Counsel was not ineffective for failing to object to the voluntary manslaughter charge. Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000)(counsel cannot be deemed ineffective for failing to raise a meritless claim).

#### **IV. CONCLUSION**

For the foregoing reason's petitioner David Elliot's

objections to the Report and Recommendation will be overruled.

An appropriate order follows.

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**ORDER**

AND NOW, this \_\_\_\_\_ day of February 2004, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (Document No. 1), United States Magistrate Judge Arnold Rapoport's Report and Recommendation (Document No. 8), Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 9), and following a hearing at which counsel for all parties were heard, for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Document No. 8) is **APPROVED** and **ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Document No. 9) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody (Document No. 1) is **DENIED**;
4. There is no probable cause to issue a certificate of appealability;
5. The Clerk of the Court shall mark this case closed for statistical purposes.

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S.J.